centerforconstitutionalrights
on the front lines for social justice

March 21, 2012

Via Federal Express

Colonel Denise R. Lind
Chief Judge, 1st Judicial Circuit
U.S. Army Trial Judiciary
U.S. Army Military District of Washington
[redacted]
(b)(6)
[redacted]

Re: Access to Court-Martial Records in *United States v. Bradley Manning*

Dear Chief Judge Lind:

The Center for Constitutional Rights (CCR) represents the Wikileaks media organization and its publisher Mr. Julian Assange regarding access to the court-martial proceedings in *United States v. Bradley Manning* at Fort Meade, Maryland. We write to request that the Court make available to the public and the media for inspection and copying all documents and information filed in the *Manning* case, including the docket sheet, all motions and responses thereto, all rulings and orders, and verbatim transcripts or other recordings of all conferences and hearings before the Court. We have been unable to obtain access to these important documents and have been told that they are not being made available to the public, media or interested parties. As the Manning court martial purports to be a public trial, we cannot understand why critical aspects of the proceedings are being withheld from public view. As Circuit Judge Damon Keith wrote in *Detroit Free Press v. Ashcroft*, 303 F.3d 681, 683 (6th Cir. 2002): "Democracies die behind closed doors." We urge the Court to take the action required by military law and the Constitution and make these documents available.

First, there is no dispute that military law (including RCM 806) mandates a presumption of open, public court-martial trials, which may be overcome only in limited circumstances based on specific findings that closure is necessary. The public, including the media, have First Amendment and common law rights of access to criminal trials. There is also no dispute that the public has a compelling interest in obtaining access to all documents and information filed in Pfc. Manning's case given the nature of his alleged offenses. Access for media organizations, including groups such as Wikileaks which provide groundbreaking independent reporting on issues of great international significance, is especially important to ensure transparency, freedom of the press, and the integrity of these proceedings. The fairness of the proceedings have already been called into doubt by strong evidence and recent findings by United Nations Special Rapporteur on Torture, Juan Mendez, that Pfc. Manning suffered cruel, inhuman and degrading treatment – if not torture – during an 11-month period of solitary pretrial confinement in Kuwait and at Marine Corps Base Quantico.

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Second, Wikileaks and Mr. Assange also have a unique and obvious interest in obtaining access to documents and information filed in this case. For more than a year, there has been intense worldwide speculation that hundreds of thousands of allegedly classified diplomatic cables published by Wikileaks – as well as *The New York Times*, *The Guardian*, and other international media organizations – were provided to Wikileaks and/or Mr. Assange by Pfc. Manning. Mr. Assange notably has a particular personal interest in this case because it appears that federal prosecutors in the Eastern District of Virginia have obtained a sealed indictment against him concerning matters that, based on prior official statements, will likely be addressed in Pfc. Manning's court-martial.

Notwithstanding these substantial interests, the *Manning* court-martial case thus far has not proceeded with the requisite openness. Instead, to date this court-martial reflects – and indeed compounds – the lack of openness experienced in Pfc. Manning's prior Article 32 hearing. Documents and information filed in the case are not available to the public anywhere, nor has the public received appropriate prior notice of issues to be litigated in the case. For example, undersigned counsel attended the motions hearing on March 15, 2012, and determined that it was not possible to understand fully or adequately the issues being litigated because the motions and response thereto were not available. Without access to these materials, the *Manning* hearings and trial cannot credibly be called open and public. We do not understand how a court-martial proceeding can be deemed to comply with the UCMJ or the Constitution unless its proceedings are accessible in a timely fashion. The public and our clients must be given access to the legal filings when filed and prior to arguments before the Court.

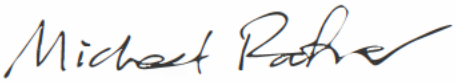
In addition, like the prior Article 32 hearing, it appears that a number of substantive issues are argued and decided in secret, in closed Rule 802 conferences. These important issues should be argued and decided in open court and on the record. This impedes the public's and media's right to a public trial. For example, when the undersigned was in court we were informed that the Court had signed a pre-trial publicity order apparently after a closed door 802 discussion with counsel. The argument regarding such an order, the decision and the order itself should have happened in public. This is particularly so because the order concerns what can and cannot be said to the public and press; an order of that sort should be dealt with in open court.

We therefore request that the Court order disclosure of all documents and information filed in the *Manning* case, and further implement procedures similar to those used in connection with military commission proceedings at Guantánamo Bay to ensure that information is accessible to the public in a timely and meaningful fashion. Specifically, we request that the Court enter an order requiring (a) immediate public access to all documents and information filed to date in this case, and (b) public disclosure of documents and information filed now or in the future, including disclosure of motions and responses thereto on a real-time basis, prior to argument and rulings on such motions.

We respectfully request that the Court enter such an order, or otherwise respond to this request, by Friday, March 30, 2012, in order to allow Wikileaks and Mr. Assange to seek any further judicial relief that may be necessary to protect their rights and the rights of the media and the general public.

If you have any questions, please do not hesitate to contact me.

Respectfully submitted,



Michael Ratner
Center for Constitutional Rights
[redacted]
(b)(6)

Counsel for Wikileaks and Julian Assange

cc: Jennifer Robinson

Jeh C. Johnson
General Counsel
Office of the General Counsel
[redacted]
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centerforconstitutionalrights

April 23, 2012

[redacted]

David E. Coombs, Esq.
Law Office of David E. Coombs
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Re: *United States v. Bradley Manning*

Dear Mr. Coombs:

The Center for Constitutional Rights (CCR) represents the Wikileaks media organization and its publisher Julian Assange regarding access to the court-martial proceedings in *United States v. Bradley Manning* at Fort Meade, Maryland. We are also making this request for access on behalf of the Center for Constitutional Rights, a non-profit legal and educational organization. We ask that you forward copies of this letter to Chief Judge Lind and counsel for the prosecution in advance of the hearings commencing April 24, 2012.

By letter to Chief Judge Lind dated March 21, 2012, CCR requested public access to documents and information filed in this case, including the docket sheet, all motions and responses thereto, all rulings and orders, and verbatim transcripts or other recordings of all conferences and hearings before the Court. We have received no response to our letter, and, with the exception of certain redacted defense motions recently published on your website, continue to be denied access to the requested materials without legal justification or other explanation.

Accordingly, in order to avoid any confusion and ensure that we have exhausted efforts to obtain meaningful, timely access to documents and information filed in this case without further litigation, we now renew our request for public access to these materials, including without limitation the following items referenced in open court during the arraignment and motions hearings on February 23, March 15, 16 2012:

- All orders issued by the Court, including the case management order, pretrial publicity order, protective order regarding classified information, and other protective orders;
- The government's motion papers and responses to the redacted defense motions; and
- Authenticated transcripts of all proceedings, including in particular transcripts of open court sessions, at the same time and in the same form they are provided to counsel for the parties.

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This request includes timely public access to all documents and information filed subsequent to the March 16 hearing and all such documents and information filed in the future. These should be provided when filed.

We further request that the Court require all conferences held pursuant to R.C.M. 802 be held in open court and be made part of the record in this case, to the extent they involve substantive matters, and regardless of whether the parties agree to have those substantive matters discussed and decided off the record. Moreover, we request that all Rule 802 conferences which have already occurred be reconstituted in open court.

To the extent these requests are denied (or not decided) we request an explanation for the purported factual and legal basis for such result. We expect an immediate decision as the loss of First Amendment rights in this context "for even minimal periods of time" constitutes irreparable harm. *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (citing *New York Times Co. v. United States*, 403 U.S. 713 (1971)).

As you are aware, the First Amendment to the Constitution and the federal common law guarantee a right of public access to criminal proceedings, including courts-martial, except in limited circumstances. *See Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 606 (1982); *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 597 (1978). In particular, "[t]he First Amendment guarantees the press and the public a general right of access to court proceedings and *court documents* unless there are compelling reasons demonstrating why it cannot be observed." *Washington Post Co. v. Robinson*, 935 F.2d 282, 287 (D.C. Cir. 1991) (emphasis added) (citing cases); *see also In re Washington Post Co.*, 807 F.2d 383, 390-91 (4th Cir. 1986) (same). Access may only be denied where the government establishes that closure is necessary to further a compelling government interest and narrowly tailored to serve that interest, and the court makes specific findings on the record supporting the closure to aid review. *See Press-Enterprise Co. v. Superior Court*, 464 U.S. 501 (1984). Any motion or request to seal a document or otherwise not disclose a document to the public must be "docketed reasonably in advance of [its] disposition so as to give the public and press an opportunity to intervene and present their objections to the court." *In re Washington Post Co.*, 807 F.2d 383, 390-91 (4th Cir. 1986) (quoting *In re Knight Publishing Co.*, 743 F2d 231, 234 (4th Cir. 1984)).

Indeed, it is reversible error for a court to withhold from the public each and every document filed, subject to further review and disclosure, because such procedures "impermissibly reverse the 'presumption of openness' that characterizes criminal proceedings 'under our system of justice." *Associated Press v. District Court*, 705 F.2d 1143, 1147 (9th Cir. 1983) (quoting *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 573 (1980)). It is "irrelevant" that some of the pretrial documents might only be withheld for a short time. *Id.*

The Court's authority to grant CCR's requests for public access pursuant to the All Writs Act, 28 U.S.C. § 1651(a), is equally clear and indisputable. *See, e.g., Denver Post Co. v. United States*, Army Misc. 20041215 (A.C.C.A. 2005), *available at* 2005 CCA LEXIS 550 (exercising jurisdiction and granting writ of mandamus to allow public access); *see also ABC, Inc. v. Powell*, 47 M.J. 363, 365 (C.A.A.F. 1997), *available at* 1997 CAAF LEXIS 74. This is particularly true given the Supreme Court's repeated conclusions that openness has a positive effect on the truth-determining function of proceedings and *can affect outcome. See Gannett Co. v. DePasquale*, 443 U.S. 368, 383 (1979)

("Openness in court proceedings may improve the quality of testimony, induce unknown witnesses to come forward with relevant testimony, cause all trial participants to perform their duties more conscientiously"); *Richmond Newspapers*, 448 U.S. at 596 (open trials promote "true and accurate fact-finding") (Brennan, J., concurring); *Globe Newspaper*, 457 U.S. at 606 ("[P]ublic scrutiny enhances the quality and safeguards the integrity of the factfinding process.").

Finally, senior CCR attorney Shayana Kadidal will attend the hearing in this case on April 24, 2012. We request that he be afforded the opportunity to address the Court directly and present arguments concerning our requests for public access to documents and information filed in this case.

If you, the prosecution or the Court have any questions concerning request, please do not hesitate to contact Mr. Kadidal at [redacted (b)(6)]

Very truly yours,

Michael Ratner
Wells Dixon
Shayana Kadidal

Counsel for Wikileaks & Julian Assange